IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO.11 OF 2005

Mrs Sondur Rajini
Nee Rajini Hosbet Suresh
Hindu, Indian Inhabitant presently
residing at 103, Prachi, Off.Juhu
Versova Link Road, Andheri (West),
Mumbai 400 058. .. Appellant.

Vs

Mr Sondur Gopal
Hindu, Indian Inhabitant, presently
residing at Song Bird, 1st Floor,
1st Langford Gardens,
Bangalore 560 001 and having
permanent address at 35, Vijaynagar,
Hubli 580 032. .. Respondent

Mr.Y.H.Muchhala i/b Mr Tushar Goradia and H.Nikumb for the appellant.

Ms B.V.Nagarathn with Ms A.B.Kapadia i/b M/s Daphtary Ferreira & Divan for the respondent.

CORAM : S.B.MHASE &
D.B.BHOSALE, JJ.

DATE : APRIL 11, 2005.

JUDGMENT: (PER D.B.BHOSALE, J.)

1. Heard the learned counsel for the parties. Admit. Ms.Nagarathn, learned counsel, waives service for the respondent. By consent of the learned counsel appearing for the parties, taken up for final hearing.

2. This appeal, by the wife, is directed against the judgment and order dated 1.1.2005 rendered by the Family Court in Interim Application No.235 of 2004 filed in Petition No.A-531 of 2004, allowing the said application filed by the respondent-husband under section 1(2) of the Hindu Marriage Act, 1955 (for short, "H.M.Act"). By that application, the respondent had prayed for dismissal of the petition filed by the appellant as not maintainable on the ground that the parties are citizens of Sweden and not domiciled in India. The appellant's petition was filed inter-alia seeking a decree of judicial separation under section 10 of H.M.Act, for custody of minor children and for maintenance.

3. The factual matrix, sans unnecessary details, is as follows: The appellant and the respondent tied the nuptial knot on 25.6.1989 under the Hindu Vedic Rites at Bangalore. When they got married the respondent was working in Sweden with B.C.F.I.Philips. After marriage, the respondent left for Sweden in the first week of July, 1989 followed by the appellant in November, 1989. The couple was blessed with their first child Natasha on 19.9.1993. Unfortunately, Natasha is a down-syndrone child. In December, 1993 they purchased their own house in

Stockholm. The parties applied for Swedish citizenship in 1995-1996 which was granted to them in 1997. In June,1997 the appellant and the respondent moved to Mumbai as, according to the appellant, the employer of the respondent, viz. A.T.Kearney was setting up his business in India. Between June, 1997 and mid 1999 the respondent lived with the appellant and Natasha in India. In mid 1999, A.T.Kearney offered him a job in Sydney which he accepted and accordingly moved to Sydney, Australia. The appellant, respondent and Natasha went to Sydney on sponsorship visa 457 which allowed them to stay and work in Australia for a period of four years. While they were in Australia the respondent disposed of their house in Sweden in 2000. The couple was once again blessed with their second child Smyan on 9.2.2001 when they were at Sydney. The respondent lost his job on 7.7.2001 and since he no longer had sponsor he had to leave Australia in the second week of January 2002. They shifted to Stockholm, Sweden and lived there in a leased house till October, 2002 during which period he had no job. On 2.10.2002 the respondent got another job at Sydney, Australia with Infosis Technology Ltd. Again the respondent got temporary visa 457. He was then sponsored by Infosis. He went to Sydney on 18.12.2002. In the

meanwhile, on 14.12.2002, the appellant left for Mumbai with the children. On 31.1.2003 the appellant alongwith the children left for Australia. After a brief stay in Australia, the appellant came back to India with both the children on 17.12.2003 on a tourist visa. The respondent stayed back in Sydney. In January, 2004 for the first time, according to the respondent, the appellant informed him that she did not want to return to Sydney at all. It appears that thereafter the respondent came back to India and tried to persuade the appellant to accompany him back to Sydney. Since the appellant was determined not to go back to Sydney, she filed the petition seeking a decree of judicial separation under section 10 of H.M.Act and also prayed for permanent custody of the minor children as also for maintenance.

4. The case set up by the respondent seeking to challenge the maintainability of the petition is that the parties in the petition are citizens of Sweden and not domiciled in India and in view thereof the petition filed by the wife seeking judicial separation under the H.M.Act is hit by the provisions of section 1(2) of the said Act. A specific case set up by the respondent, in short, is that they were citizens of Sweden and are presently domiciled in

Australia, which is their domicile of choice and, therefore, the jurisdiction of the Family Court is barred by the provisions of section 1(2) of H.M.Act. As against this, the case set up by the appellant is that admittedly their domicile of origin is in India and that was never given up or abandoned though they acquired citizenship of Sweden and then moved to Australia. The respondent's application was also challenged on the ground that even if it is assumed that the respondent acquired domicile in Sweden she never changed her domicile and continued her domicile in India. In the alternative, it was contended that even if it is assumed that she also had acquired domicile of Sweden that was abandoned by both of them when they shifted to Australia and, therefore, their domicile of origin i.e. India, got revived. In short, the case of the appellant is that the appellant and the respondent both are domiciled in India and, therefore, the Family Court in Mumbai has jurisdiction to entertain her petition seeking a decree of judicial separation.

5. We heard the learned counsel appearing for the parties at great length, perused the entire material placed before us as also several judgments of the Apex Court and High Courts cited before us.

It may be noted that before we heard the learned counsel for the parties on merits, we made sincere efforts to persuade the parties to settle their dispute amicably, for and in the interest of the children. We also suggested to the parties to go for mediation, which was not acceptable to the respondent. It is against this backdrop we heard the learned counsel for the parties.

6. Mr Muchhala, learned senior counsel for the appellant, submitted that admittedly the marriage between the appellant and the respondent took place according to Hindu Vedic Rites and, therefore, the provisions of H.M.Act apply to both the parties. After taking us thorough the several documents produced on record by the respondent, Mr.Muchhala submitted that on the date of marriage both were domiciled in India. He further submitted that once the H.M.Act applies, there is no provision in the said Act stating that it ceases to apply at any subsequent stage. The issue of domicile raised by the respondent is, therefore, totally irrelevant keeping in view the scheme of H.M.Act. Mr.Muchhala firmly submitted that the parties never lost their domicile in India though they shifted to Sweden and acquired citizenship there. He next submitted that

even if it is assumed that they acquired citizenship as also domicile in Sweden in 1997, after they left Sweden permanently they abandoned their domicile in that country and as a result of which their domicile of origin got revived. Acquisition of citizenship and domicile are independent of each other and in any case it cannot be said that by acquiring citizenship of Sweden they also acquired domicile in that country. By making reference to section 19 of H.M.Act he submitted that the parties must satisfy any one of the requirements of section 19 to invest a Court with jurisdiction in a matrimonial petition. Section 19 does not speak of domicile at all. He further submitted that for an applicability of H.M.Act it is not necessary to satisfy the requirement of Indian domicile. It was further submitted that if the requirement of Indian domicile is held to be necessary for applicability of H.M.Act, it will lead to great hardship to Hindu wife who requires to go from place to place wherever her husband takes her and that will also lead to very serious social problem. Mr Muchhala, next submitted that even if the requirement of domicile is held to be necessary the relevant date for considering a domicile of the parties would be the date of marriage and not the date of filing of the petition.

According to Mr Muchhala, the husband by his unilateral decision cannot alter a system of law by which the marriage is governed. In support of his contention he placed reliance upon few judgments to which we propose to make a reference at an appropriate stage in the later part of the judgment.

7. On the other hand, Ms Nagarathn, learned counsel for the respondent, submitted that the parties being citizens of Sweden and domiciled in Australia, the petition filed by the appellant under the provisions of H.M.Act is not maintainable. For Hindus, to be a domicile in India is a condition precedent for applicability of H.M.Act as contemplated under section 1(2) of the said Act. In the instant case, the parties are not domiciled in India and, therefore, the H.M.Act itself is not applicable and the petition deserves to be rejected not only on the ground of jurisdiction but also on the ground of inapplicability of the said Act. In other words, she submitted that H.M.Act applies only to Hindus domiciled in the territories of India. She took us through several documents produced on record to contend that even on the date of marriage, the respondent was not domiciled in India and, therefore,

with the marriage the appellant followed the domicile of the respondent which was in Sweden at the relevant time. For the present, Australia being his domicile of choice, the appellant also is domiciled of Australia and therefore, she cannot maintain the petition under H.M.Act in India. According to Ms Nagarathn, the documents produced by the respondent clearly demonstrate that he was domiciled in Australia on the date of filing of the petition. It was next contended that assuming that the Family Court in India has jurisdiction and the H.M.Act is applicable to the parties herein, the appellant could not have invoked section 19(iiia) for filing the petition as the residence of the appellant in Mumbai was only temporary as a tourist for a period of six months and her visa was nonextendable. She further submitted that in determining an issue of domicile in the realm of private international law, two constituent elements that are necessary by the English law for existence of domicile are: residence of particular kind; and an intention of particular kind. After applying the said test of domicile, the appellant cannot maintain her petition in any court in India. Ms Nagarathn, learned counsel for the respondent, also placed reliance upon the judgments of High Courts and the Apex Court to which we will

make reference at an appropriate stage in the later part of the judgment.

8. The questions raised and involved in this appeal and the submissions advanced by the learned counsel for the parties are centered around the provisions contained in sections 1,2 and 19 of the H.M.Act, which we deem it appropriate to reproduce for better appreciation of their submissions. Sections 1, 2 and 19 read thus:

> "1. Short title and extent--
>
> (1) This Act may be called the Hindu Marriage Act, 1955.
> (2) It extends to the whole of India except the State of Jammu and Kashmir, and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.
>
> 2. Application of Act--
>
> (1) This Act applies--
> (a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,
> (b) to any person who is a Buddhist, Jaina or Sikh by religion, and
> (c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christain, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

> 19. Court to which petition shall be presented--
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> Every petition under this Act shall be presented to the district court within the local limits of whose ordinary civil jurisdiction--
> (i) the marriage was solemnised, or
> (ii) the respondent, at the time of the presentation of the petition, resides, or
> (iii) the parties to the marriage last resided together, or
> (iiia) in case the wife is the petitioner, where she is residing on the date of presentation of the petition, or
> (iv) the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is, at that time, residing outside the territories to which this Act extends, or has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of him if he were alive".

8.1 Section 1 provides that the H.M.Act extends to the whole of India, except the State of Jammu and Kashmir, and applies to Hindus domiciled in the territories to which this Act extends even if they are outside the said territories. Section 2 speaks about persons to whom H.M. Act applies. It provides different categories of persons, including a Buddhist, Jaina or Sikh by religion, to whom H.M.Act applies, making exception of a Muslim, Christain, Parsi or Jew by religion, unless it is proved that any other person would not have been governed by the Hindu Law or by any custom or usage as part of that

law in respect of any of the matter dealt with if this Act had not been passed. In short, section 2 defines the expression ‘Hindu’ to whom H.M.Act applies. Sub-section (3) of Section 2 provides that the expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this Section. Section 19 deals with the jurisdiction of a Court to which petition for reliefs under H.M.Act shall be presented.The clauses (i),(ii),(iii),(iiia) and (iv) of section 19 provide within whose ordinary original civil jurisdiction the petition under the provisions of H.M.Act shall be presented to. Clause (iiia) was introduced in section 19 by The Marriage Laws (Amendment) Act, 2003 (Act No.50 of 2003) with effect from 23.12.2003 which invested to the Family Court with the jurisdiction to entertain and try the petition of wife where she is residing on the date of presentation of the petition. This amendment was introduced to alleviate the hardship faced by Hindu wife as is evident from the statement of objects and reasons of Amendment Act No.50 of 2003. The statement of objects and reasons state that in case the husband and wife have separated and are residing

at two different places or two different towns far way from each other and if they intend to present petition under H.M.Act for any relief they are forced to go to a place where they resided together for filing petition. This causes hardship to a wife who generally has no independent source of income or guardian. It is thus clear that the Legislature intended to confer right on the wife to present a petition seeking reliefs under the provisions contained in H.M.Act at the place where she is residing at the time of presentation of such petition What is common in all the clauses of section 19 is the word ‘residence’. A close look at the provisions of clause (ii), (iii), (iiia) and (iv) would show that they do not specify a length and/or character of residence. However, it would not mean a residence, which is purely of a temporary nature without there being an intention to stay there permanently or for considerable length of time. A residence of a wife with her parents at the time of filing of a petition under the H.M.Act would be, in our opinion, sufficient to attract the jurisdiction of Court where the residence of her parents situate. In so far as clause (iv) is concerned, it provides that the petitioner, who is residing at the time of presentation of the petition, in a case where the

respondent is, at that time residing outside the territories to which this Act extends, shall present his/her petition to the District Court/Family Court within the local limits of whose ordinary civil jurisdiction the petitioner resides. In other words, if the respondent is residing outside the territories to which this Act extends the petitioner can maintain the petition under H.M.Act before the District Court/Family Court within the local limits of whose ordinary civil jurisdiction the petitioner is residing at the time of presentation of the petition. It is, thus, clear that a condition of a domicile in India, as contemplated in Section 1(2) of H.M.Act, is necessary ingredient to maintain a petition seeking reliefs under the H.M.Act. In other words, a wife, who is domiciled and residing in India when she presents a petition, seeking reliefs under H.M.Act, her petition would be maintainable in the territories of India and in the Court within the local limits of whose ordinary civil jurisdiction she resides. Everything depends on the attendant circumstances. A conjoint reading of section 1, 2 and 19 of H.M.Act would, thus, show that a residence alone is not sufficient to maintain a petition seeking reliefs under H.M.Act. A residence coupled with domicile in India would be necessary to maintain such petition in

the courts in India. In so far as the present case is concerned, whether the appellant was domiciled in India when she filed petition in the Family Court at Bombay will be considered in the latter part of the judgment. However, it may be noticed that the appellant prior to her marriage was residing in Mumbai with her parents and presently also she stays with her parents in Mumbai and, therefore, if she is held to be a domicile in India, under sub-section (iiia) of section 19 her petition would be maintainable in the Family Court, Mumbai. The submission of Ms.Nagarathn, learned counsel for the respondents that short stay in India cannot be termed as residence so as to confer a jurisdiction to the court in India under section 19 of H.M.Act is not tenable and must be rejected. Similarly, the contention of Mr.Muchalla, learned senior counsel for the appellant that for application of H.M.Act and entitling a wife to file petition in India seeking relief thereunder a condition of domicile in India is not necessary, is without substance and not tenable and, therefore, deserves to be rejected.

9. Since, in our opinion, a domicile of India is a condition precedent for invoking the provisions of H.M.Act, what would be the relevant time, whether a

date of marriage or of petition, is the question we would now like to address before going to the principle question involved in this appeal. For addressing this question, the observations made by the Apex Court in **Y.Narasimha Rao and ors Vs. Y.Venkata Lakshmi and Anr, (1991) 3 supreme Court Cases 451** may be useful. In paragraph 17, the Apex Court has observed that "the marriages which take place in this country can only be under either the customary or the statutory law in force in this country. Hence, the only law that can be applicable to the matrimonial disputes is the one under which the parties are married, and no other law". The Apex Court was considering the application of a foreign judgment in matrimonial dispute between the husband and wife. In paragraph 21 the Apex Court further observed that "the parties do and ought to know their rights and obligations when they marry under a particular law. They cannot be heard to make a grievance about it later or allowed to by-pass it by subterfuges. The rule also has an advantage of rescuing the institution of marriage from the uncertain maze of the rules of the Private International Law of the different countries with regard to jurisdiction and merits based variously on domicile, nationality, residence- permanent or

temporary or ad hoc, forum, proper law etc and ensuring certainty in the most vital field of national life and conformity with public policy". In the present case, admittedly, the marriage was solemnised by Hindu Vedic Rites and registered under H.M.Act. It may be noticed that none of the provisions of H.M.Act lay down the time and condition under which it will cease to apply. In other words, once the provisions of H.M.Act apply, it would continue to apply as long as the marriage exists and even for dissolution of the marriage. The Hindu marriage gives rise to bundle of rights and obligations between the parties to the marriage and their progeny. Therefore, the system of law which should govern a marriage, should remain constant and cannot change with vagaries/whims of the parties to the marriage. We may briefly glance at **Cheshire & North Pvt International Law**, wherein the learned Author at page 134 points out that "it has been universally recognised that questions affecting the personal status of a human being should be governed constantly by one and the same law, irrespective of where he may happen to be or of where the facts giving rise to the question may have occurred". The time at which the domicile is to be determined is when the proceedings under H.M.Act are commenced, is

accepted then every petition filed by the wife whose husband moves from one country to another for the purposes of job or for any purpose whatsoever, he would be able to frustrate a petition brought by the wife by changing his domicile even between the presentation of the petition and the hearing of the case. The rule is "once competent, always competent" and this will be so even if the party domiciled in India at the time of their marriage has since changed his domicile, disassociated himself from the determination of his status by the Court in India. The proposition of law canvassed, that the time at which the domicile is to be determined is when the proceedings are commenced, therefore, cannot be accepted, in so far as the petitions under H.M.Act is concerned, inasmuch as it would be against the public policy in this country and which may create a serious social problem. The Hindu society is deeply interested in maintaining integrity of the institution of the marriage. Once the parties have selected H.M.Act as their personal law, they cannot abdicate the same at their free will or as per exigencies of situation or according to their whims and fancies. Therefore, we are of the considered opinion that the time at which the domicile is to be determined is when the parties tie nuptial knot under

the Hindu Marriage Act and not the date when an application is made for matrimonial reliefs. As a natural corollary thereof, even if a party to the matrimonial petition establishes that after marriage he acquired domicile of some other country, it would not take away the jurisdiction of the Court in India if on the date of the marriage he was domiciled in India. It is unjust that a party to the marriage can change his entire system of personal law by his or her unilateral decision. If that is allowed it would make the position of a wife very miserable or helpless. We have, therefore, no hesitation in holding that the provisions of H.M.Act will continue to apply to the marriage of parties who were admittedly domiciled in India on the date of their marriage and they cannot be heard to make a grievance about it later or allowed to by-pass it by subterfuges. The rule, as observed by the Apex Court in the case of **Y.Narsimha Rao** also has an advantage of rescuing the institution of marriage from uncertain maze of the rules of the Private International Law of the different countries with regard to jurisdiction.

10. We would now like to consider the principal contention urged by Ms Nagarathn, learned counsel for

the respondent that on the date of filing of the petition the respondent, and as a consequence thereof the appellant also, was not domiciled in India and, therefore the family Court has no jurisdiction to entertain the petition filed by the appellant for the reliefs under the provisions of H.M.Act. Under both the Indian and English Private International Law, there are four general rules in respect of domicile: No person can be without a domicile; No person can have simultaneously two domiciles; Domicile denotes the connection of a person with a territorial system of law; and the presumption is in favour of continuance of an existing domicile. The Apex Court in **Sankaran Govindan Vs. Lakshmi Bharathi and Ors, AIR 1974 Supreme Court 1764**, has observed that a domicile is a mixed question of law and fact and there is perhaps no Chapter in the law that has from such extensive discussion received less satisfactory settlement. In **Y. Narasimha Rao's** case (supra), the Apex court has observed that the Courts in this country have so far tried to follow in the matrimonial law the English rules of Private International Law, whether common law rules or statutory rules. It has further observed that "inspite, however, of more than 43 years of independence we find that the legislature has not

thought it fit to enact rules of Private International Law in this area and in the absence of such initiative from the legislature the courts in this country have been forced to fall back upon precedents which have taken their inspiration, as stated earlier, from the English rules. Even in doing so they have not been uniform in practice with the result that we have some conflicting decisions in the area." Keeping these observations in view, we would like to consider the judgments cited by both the learned counsel in support of their contentions so as to find out what is the law settled by the Apex court in so far as the question of domicile in relation to the matrimonial dispute qua the H.M.Act is concerned.

10.1 In **Mrs J.S. Vs. F.J.S, AIR 1932 Lahor 468 (1) (Special Bench)**, the Special Bench was dealing with section 10 of the Divorce Act,(1860) where an issue of domicile of a party was involved. In that case it observed that before granting a decree of divorce under section 10, a clear finding of domicile of parties should be arrived at.

10.2 In **Central Bank of India Ltd V. Ram Narain, AIR 1955 SC 36**, the Apex Court was considering the

question whether a person accused of an offence under the Indian Penal Code and committed in a district which after the partition of India became Pakistan, could be tried for that offence by a criminal court in India after his migration to that country, and thereafter acquiring the status of a citizen. The incidental question whether the respondent therein had Indian domicile at the time of the commission of offence was also addressed by the Apex Court. Persons domiciled in India at the time of coming into force of our Constitution were given the status of citizens and the respondent therein would have come within the ambit of section 188 of Cr.P.C. The Apex Court in paragraph 6 of the judgment, observed thus:

> "6... ... Writers on Private International Law are agreed that it is impossible to lay down an absolute definition of 'domicil'. The simplest definition of this expression has been given by Chitty, J. in -- 'Craignish V. Craignish, (1892) 3 Ch.180, at p.192 (A), wherein the learned Judge said:
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> > "That place is properly the domicil of a person in which his habitation is fixed without any present intention of removing therefrom".
>
> . But even this definition is not an absolute one. The truth is that the term 'domicil' lends itself to illustrations but not to definition. Be that as it may <u>two constituent elements that are necessary by English Law for the existence of domicil are: (1) a residence of a particular kind, and (2)</u>

> an intention of a particular kind. There must be the factum and there must be the animus. The residence need not be continuous but that must be indefinite, not purely fleeting. The intention must be a present intention to reside for ever in the country where the residence has been taken up.
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> . It is also a well established proposition that a person may have no home but he cannot be without a domicil and the law may attribute to him a domicil in a country where in reality he has not. A person may be a vagrant as when he lives in a yacht or wanderer from one European hotel to another, but neverthless the law will arbitrarily ascribe to him a domicil in one particular territory. In order to make the rule that nobody can be without a domicil effective, the law assigns what is called a domicil of origin to every person at his birth. This prevails until a new domicil has been acquired, so that if a person leaves the country of his origin with an undoubted intention of never returning to it again, nevertheless his domicil or origin adheres to him until he actually settles with the requisite intention in some other country".
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> (emphasis supplied)

10.3 In **Kedar Pandey Vs Narain Bikram Sah, AIR 1966 Supreme Court 160**, the question was with regard to succession to the property of a person who died in England which arose from a decree in a suit for partition. To answer this question, the domicile of deceased had become relevant to find out whether English Law of succession or Indian Law for Succession would apply. The observations made by the apex Court in paragraphs 9 and 10 of the Judgment reads thus :

"9. The crucial question for determination in this case, therefore, is whether Narain Raja had acquired the domicil of choice in India.

10. The law on the topic is well established but the difficulty is found in its application to varying combination of circumstances in each case. The law attributes to every person at birth a domicil which is called a domicil of origin. This domicil may be changed, and a new domicil, which is called a domicil of choice, acquired; but the two kinds of domicil differ in one respect. The domicil of origin is received by operation of law at birth; the domicil of choice is acquired later by the actual removal of an individual to another country accompanied by his animus manendi. The domicil of origin is determined by the domicil, at the time of the child's birth, of that person upon whom he is legally dependent. A legitimate child born in a wedlock to a livery father receives the domicil of the father at the time of the birth; a posthumous legitimate child receives that of the mother at that time. As regards change of domicil, any person not under disability may at any time change his existing domicil and acquire for himself a domicil of choice by the fact of residing in a country other than that of his domicil of origin with the intention of continuing to reside there indefinitely. For this purpose residence is a mere physical fact, and means no more than personal presence in a locality, regarded apart from any of the circumstances attending it. If this physical fact is accompanied by the required state of mind, neither its character nor its duration is in any way material. The state of mind, or animus manendi, which is required demands that the person whose domicil is the object of the enquiry should have formed a fixed and settled purpose of making his principal or sole permanent home in the country of residence, or in effect, he should have formed a deliberate intention to settle

there. It is also well established that the onus of proving that a domicil has been chosen in substitution for the domicil of origin lies upon those who assert that the domicil of origin has been lost. The domicil of origin continues unless a fixed and settled intention of abandoning the first domicil and acquiring another as the sole domicil is clearly shown".

(emphasis supplied)

10.4 In **Louis De Raedt Vs. Union of India and others, AIR 1991 Supreme Court 1836**, the Apex Court in paragraphs 9 and 10 observed thus :

"9. There is no force in the argument of Mr.Verghese that for the sole reason that the petitioner has been staying in this country for more than a decade before the commencement of the Constitution, he must be deemed to have acquired his domicile in this country and consequently the Indian citizenship. Although it is impossible to lay down an absolute definition of domicile, as was stated in **Central Bank of India V.Ram Narain AIR 1955 SC 36**, it is fully established that an intention to reside for ever in a country where one has taken up his residence is an essential constituent element for the existence of domicile in that country. Domicile has been described in Halsbury's Laws of England (4th edition, Volume 8, Paragraph 421) as the legal relationship between individual and a territory with a distinctive legal system which invokes that system as his personal law. Every person must have a personal law, and accordingly every one must have a domicile. He receives at birth a domicile of origin which remains his domicile, wherever he goes, unless and until he acquires a new domicile. The new domicile, acquired subsequently, is generally called a domicile of choice. The domicile of origin is received by operation of law at birth and for

> acquisition of a domicile of choice one of the necessary conditions is the intention to remain there permanently. The domicile of origin is retained and cannot be divested until the acquisition of the domicile of choice. By merely leaving his country, even permanently, one will not, in the eye of law, lose his domicile until he acquires a new one. This aspect was discussed in **Central Bank of India V. Ram Narain** (supra) where it was pointed out that if a person leaves the country of his origin with undoubted intention of never returning to it again, neverthless his domicile of origin adheres to him until he actually settles with the requisite intention in some other country. The position was summed in Halsbury thus:
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> > "He may have his home in one country, but be deemed to be domiciled in another".
>
> . Thus the proposition that the domicile of origin is retained until the acquisition of a domicile of choice is well established and does not admit of any exception.
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> 10. For the acquisition of a domicile of choice, it must be shown that the person concerned had a certain state of mind, the animus manendi. If he claims that he acquired a new domicile at a particular time, he must prove that he had formed the intention of making his permanent home in the country of residence and of continuing to reside there permanently. Residence alone, unaccompanied by this state of mind, is insufficient".
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> (emphasis supplied)

10.5 Similarly, the Apex Court in **Sankaran Govindan's** case (supra) has observed that "The traditional statement that, to establish domicile, there must be a present intention of permanent residence merely means that so far as the mind of the

person at the relevant time was concerned, he possessed the requisite intention. The relevant time varies with the nature of the inquiry. It may be past or present."

10.6 Reliance was also placed on the judgment of Calcutta High Court in **Gour Gopal Roy V. Smt Sipra Roy, AIR 1978 Calcutta 163**. In that case, the trial Court on the basis that one of the parties was of Indian domicile, had assumed jurisdiction under the Hindu Marriage Act. The Full bench of the High Court while dealing with the case held that the view taken by the trial Court was not correct and remanded the matter for decision on the question as to whether the husband had also acquired Indian domicile in the light of legal proposition that a domicile of choice is dependent upon (a) residence; and (b) intention of the person who resides.

10.7 In **Yogesh Bhardwaj Vs. State of U.P. and ors, (1990) 3 Supreme Court Cases 355**, the Apex Court has observed that "the domicile of choice is a combination of residence and intention. residence which is a physical fact means "bodily presence as an inhabitant". Such residence must be combined with intention to reside permanently or for an unlimited

time in a country. It is such intention coupled with residence that acquires him a new domicile. it is immaterial for this purpose that the residence is for a short duration, provided it is coupled with the requisite state of the mind, namely the intention to reside there permanently. "If a man intends to return to the land of his birth upon a clearly foreseen and reasonably anticipated contingency", such as, the end of his studies, he lacks the intention required by law. His "tastes, habits, conduct, actions, ambitions, health, hopes and project" are keys to his intention".

10.8 The Apex Court in **Y.Narsimha Rao and Ors** (supra) in paragraph 20 of the judgment has observed thus :-

> "20. From the aforesaid discussion the following rule can be deduced for recognising a foreign matrimonial judgment in this country. The jurisdiction assumed by the foreign court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married. The exceptions to this rule may be as follows: (i) where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married; (ii) where the respondent voluntarily and effectively submits to the

> jurisdiction of the forum as discussed above and contests the claim which is based on a ground available under the matrimonial law under which the parties are married; (iii) where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties".
>
> (emphasis supplied)

In paragraph 21 of the judgment, the Apex court has observed that "the rule further takes account of the needs of modern life and makes due allowance to accommodate them. Above all, it gives protection to women, the most vulnerable section of our society, whatever the strata to which they may belong. In particular it frees them from the bondage of the tyrannical and servile rule that wife's domicile follows that of her husband and that it is the husband's domiciliary law which determines the jurisdiction and judges the merits of the case."

10.9 In **D.P.Joshi Vs. State of Madhya Bharat and another, AIR 1955 SC 334**, the Apex Court has observed that "citizenship and domicile represent two different conceptions. Citizenship has reference to political status of a person and domicile to his civil rights. Domicile has reference to the system of law by which a person is governed and when we

speak of the domicile of a country, we assume that the same system of law prevails all over that country".

10.10. This Court in **Michael Anthony Rodrigues Vs. state of Bombay and ors - AIR 1956 Bombay 729**, observed that "under article 5 of the Constitution of India, nationality and domicile are two entirely different concepts in private international law. A man may have one nationality and different domicile. He may owe allegiance to one country and he may have a domicile in another country."

10.11 We may also briefly glance at Cheshire and North’s Private International Law wherein the learned author at page 149 points out that "It is important to emphasise that nationality and domicil are two different conceptions and that a man may change the latter without divesting himself of his nationality". The learned author of Cheshire at page 159 further points out that Nationality and domicil are two different conceptions. It would be useful to quote the relevant observations on page 159, which reads thus:

> . "Nationality is a possible alternative to domicil as the criterion of the personal law. These are two different conceptions. Nationality represents a person's political status, by virtue of which he owes allegiance to some particular country; domicil indicates his civil status and it provides the law by which his personal rights and obligations are determined. Nationality, depends, apart from naturalisation, on the place of birth or on parentage, domicil, as we have seen, is constituted by residence in a particular country with the intention of residing there permanently. It follows that a person may be a national of one country but domiciled in another".

It is thus clear that under both the Indian and International Law the concept of Nationality and domicile are recognised as two different conceptions which necessarily mean an Indian by retaining his domicile in India may acquire citizenship of other country. In other words, merely because a person has acquired citizenship of some other country does not necessarily mean that he has abandoned domicile of India which is his domicile of origin.

10.12 In English Private International Law until 1974, the rule was that the domicil of a husband was communicated to his wife immediately on marriage and it was necessarily and in inevitably retained by her for the duration of the marriage. This rule was much criticised as "the last barbarous relic of a wife's

servitude" and was abolished by section 1 of the Domicile and Matrimonial Proceedings Act, 1973. The domicil of a married woman as at any time on or after 1st January, 1974 "shall, instead of being the same as her husband's by virtue only of marriage, be ascertained by reference to some factors as in the case of any individual capable of having an independent domicile. We find absolutely no reason for not applying the same principle to the parties to the matrimonial dispute under the H.M.Act.

10.13 The author of Cheshire and North's Private International Law at page 152 points out that if the domicil of origin is displaced as a result of the acquisition of a domicil of choice, the rule of English law is that it is merely placed in abeyance for the time being. It remains in the background ever ready to revive and to fasten upon the propositus immediately he abandons his domicil of choice. Halsbury's Law of England, 4th edition at Para 425 state that:

> "The law attributes to everyone at birth a domicile which is called a domicile of origin. This domicile may be changed and a new domicile, which is called a domicile of choice, acquired; but the two kinds of domicile differ in the following respects:

> (1) The domicile of origin is received by operation of law at birth; the domicile of choice is acquired later by the individual actually moving to another country and intending to remain there indefinitely.
>
> (2) the domicile of origin is retained until the acquisition of a domicile of choice; it cannot be divested, although it remains in abeyance during the continuance of domicile of choice; the domicile of choice is lost by abandonment whereupon the domicile of origin will revive unless some other domicile is acquired; the domicile of choice is destroyed when it is once lost, but may be acquired anew by fulfilling the same conditions as are required in the first instance.
>
> (3) the domicile of origin is more durable then that of choice, in the sense that it is more difficult to establish a change of domicile when the domicile alleged to have been displaced is one of origin".

It is thus clear that under the English Private International Law the domicil of origin gets revived and to fasten upon the propositus immediately on his abandoning domicil of choice.

10.14 From the aforementioned judgments of the Apex Court and the High Courts, as also both, under both the Indian and English Private International Law, the following principles broadly emerge:

(a) Every person must have a personal law, and accordingly every one must have a domicile. The law

attributes to every person at birth a domicil, which is called domicil of origin. This prevails until a new domicil, which is called a domicil of choice, has been acquired by the fact of residing in a country other than that of his domicil of origin with the intention of continuing to reside there indefinitely.

(b) A domicile of origin continues and does not get divested until a domicile of choice is acquired by conscious act. By merely leaving ones own country, even permanently, such person will not in the eye of law lose his domicile until he acquires a new one.

(c) For acquiring a domicil of choice one must not only give up a country/domicil of his origin but he must make up his mind to stay for an indefinite period where he desires to acquire a domicil of choice.

(d) The intention to acquire a new domicile must be manifest and carried into execution. The two constituent elements that are necessary for the existence of domicile law are; (i) a residence of a particular kind; and (ii) an intention of a particular kind. There must be a factum and there

must be the animus.

(e) The onus of proving that a domicil has been chosen in substitution for the domicile of origin lies upon one who asserts that the domicile of origin has been lost.

(f) In order to determine a domicile of a person at a particular time, the course of his conduct and facts and circumstances before and after that time are relevant. Therefore, the petitions involving an issue of domicile, before decreeing such petition seeking reliefs under H.M.Act, it is necessary to carefully enquire into the question of domicile.

(g) It must be established that an individual, who claims change of his domicile of origin, has voluntarily fixed the habitation of himself and his family in a new country and not for a mere special or temporary purpose but with a present intention of making it his permanent home.

(h) The fact of residing in a country other than that of his domicile of origin even with the intention of continuing to reside their for long time, is not sufficient. A residence is a mere

physical fact, and means no more than personal presence in a locality. If he claims that he acquired a new domicile at a particular time, he must prove that he had formed the intention of making his permanent home in that country and of continuing to reside there permanently.

(i) Citizenship and domicile represent two different conception. Citizenship has reference to political status of a person and domicile to his civil rights. A person may have one nationality and different domicile.

(j) A domicile of a married woman does not follow that of her husband. She is capable of having an independent domicile.

(k) If the domicile of origin is displaced as a result of the acquisition of a domicile of choice, the domicile of origin is merely placed in abeyance for the time being. It remains in the background ever ready to revive and to fasten upon the propositus immediately he abandons his domicil of choice.

11. Keeping these principles in view, we would

proceed to examine the merits of the contentions urged by both the sides. According to the appellant, the domicile of origin of both the parties was admittedly India. In so far as the appellant is concerned, she asserts that her domicile of origin never changed or she never abandon that and accepted domicile of either Sweden or Australia. She never intended to change her domicile. As against this a specific case set up by the respondent-husband is that when the petition was presented by the appellant seeking reliefs under H.M.Act, both were domiciled in Australia and, therefore, the petition under H.M.Act is not maintainable. According to the respondent, even on the date of marriage he was domiciled in Sweden which was domicile of his choice and which he subsequently change to Australia. We heard the learned counsel appearing for the parties on merits and with their assistance perused the entire material placed before us. Apart from a copy of the petition filed by the appellant seeking reliefs under H.M.Act we also perused the application filed by the respondent under section 1(2), challenging maintainability of the petition. Our attention was also invited to the affidavit in reply to the application filed by the respondent under section 1(2) as also the affidavit filed by the respondent by

way of examination in chief and his cross examination. We also perused several other documents produced by the parties on record and in particular compilation filed by the respondent in support of his contentions.

12. The author of **Cheshire and North's Private International Law**, at page 143, while dealing with the evidence of intention to reside permanently pointed out that "It is impossible to lay down any positive rule with respect to the evidence necessary to prove intention. All that can be said is that every conceivable event and incident in a man's life is a relevant and an admissible indication of his state of mind. It may be necessary to examine the history of his life with the most scrupulous care, and to resort even to hearsay evidence where the question concerns the domicil that a person, now deceased, possessed in his lifetime. Nothing must be overlooked that might possibly show the place which he regarded as his permanent home at the relevant time". It was further pointed out that "the tendency is to investigate his actual state of mind, rather than to rest content with, the natural inference of his long-continued residence in a given country. The burden of proof lies on one who allege change of

domicile." Having regard to the settled principles we would now proceed to consider the case set up by both the sides in respect of their claims of domicile.

13. Ms.Nagarathn, learned counsel for the respondent invited our attention to the following documents in particular: letter dated 20.5.1986 by which his then employer had invited him to Sweden to discuss possible employment at PEAB; Euro card; memorandum of marriage dated 25.6.1989; xerox copy of the photo showing their residential house in Sweden; Natasha’s medical report dated 4.3.1997; Sweden; passport of the respondent; Indian passport of the respondent; correspondence between the respondent and his employer including his appointment letters issued by A.T.Kearney and Infosys; residential tenancy agreement dated 25.1.2003 to show that he had taken a house in Sydney on tenancy basis; a document showing that daughter - Natasha was admitted in Warrawee School; birth certificate of the children; other documents showing p ayment of tax, electricity, gas connection etc; medical papers of daughter - Natasha and correspondence between the appellant and the respondent. Reliance was also placed on a copy of the writ petition No.19101 - 19103/2004 filed in the High Court of Karnataka at

Bangalore. On the other hand Mr.Muchhala, learned counsel for the appellant invited our attention, apart from the documents relied upon by the respondent, to the chronology of the dates and events to submit that the parties never intended to change their domicile of origin or abandoned the domicile in India. The documents produced on record, according to Mr.Muchhala, do not even indirectly suggest or support, the case set up by the respondent, that he acquired domicile of Australia before filing of the petition and, therefore, the petition is not maintainable in view of section 1(2) of the H.M.Act.

14. A perusal of the application under section 1(2) of the H.M.Act filed by the respondent shows that in paragraph 18 the following averments were made:

> . In the instant case, the parties have by accepting the citizenship of Sweden, given up their domicile of origin i.e. what they had by birth in India and acquired a domicile of choice by the combination of residence and intention of permanent or indefinite residence. In the instant case the parties have by taking the Citizenship of Sweden given up their Indian Citizenship and Domicile and their residence, answer a qualitative and quantitative test in as much as both factum and animus concur. The domicile of a dependent person is in general same as and changes with the domicile of the

> person on whom in regard to his domicile, legally dependent. Therefore in the instant case the domicile of the respondent (wife), is that of her husband (applicant) herein. It is submitted that the parties have abandoned their domicile of origin and acquired a domicile of choice outside the territories of India and therefore, the Act is not applicable to the parties herein. Therefore, the invocation of Sec.10 of the Hindu Marriage Act, by the respondent, seeking relief of judicial separation, custody and maintenance is vitiated and the Family Court at Bandra ought to have rejected the petition of the respondent, at the first instance".

14.1 These averments clearly show that till the parties acquired citizenship of Sweden, which they did acquire in 1997, they had not given up their domicile of origin. A categoric statement that "by taking citizenship of Sweden they gave up their Indian citizenship and domicile and their residence" shows that even if the case of the respondent is taken as true and correct, until 1997 they were citizens and domiciled in India and they had their permanent residence in this country. The appellant-wife in her reply-affidavit, however, has denied acquisition of the domicile of Sweden though she has admitted acquisition of the citizenship in Sweden. The respondent in the affidavit filed by way of examination-in-chief states, which apparently is contrary to his pleadings, that in January 1987 he

closed down his bank accounts and packed his all belongings into several suit cases and left India to permanently live in Sweden. He has further stated that he had clear intention of permanently living abroad and he had expectation that anyone whom he married would willingly want to do so as well which, at the time of his marriage with the appellant, he claims that he had told so to her. Further in his affidavit, he has stated that he did not apply for citizenship until his job situation was stabilised in Sweden. In the cross examination though he has reiterated that at the time of marriage in 1989 he was domiciled in Sweden, on being specifically asked whether he had formal document to show that when he got married to appellant he was domiciled in Sweden, his reply was in negative. The documents produced on record such as letter offering him employment at PEAB, credit card etc do not support his case that he had acquired domicile in Sweden prior to 1989. The pleadings couple with the evidence of the respondent do not show that he was domiciled in Sweden since prior to 1989 i.e. year of his marriage.

15. From the perusal of entire material on record, it shows that the couple after their marriage in November 1989 went to Stockholm, Sweden. Natasha

was born in 1993. In 1995, they applied for citizenship which they got in 1997. However, immediately in November, 1997 they left Sweden and came back to India and stayed in Bombay and Delhi till July 1999. Thereafter, they went to Sydney where the second child was born. After staying in Sydney for some time in January 2002 they left Australia and again went to Stockholm and stayed there till February 2003. They again shifted to Sydney in February 2003 and after staying there for about 10-11 months, in December 2003 the appellant came back to Bombay. It is against the backdrop of these facts, the respondent claim that after they left Sweden and went to Australia they abandoned their domicile in Sweden and acquired Australian Domicile though their Swedish citizenship continued. Admittedly, as of today he has not acquired residence permit to stay in Australia. His application for residence permit is still pending. In his application under section 1(2) of the H.M.Act the respondent asserts that presently he is domiciled in Australia. However, no proof whatsoever is produced on record to show that he is domiciled in Australia apart from the aforementioned documents to which we propose to make a specific reference little latter. The appellant has categorically denied that they were

domiciled in Australia. She has stated that they had gone to Australia because the respondent got job there. In the affidavit filed by the respondent by way of examination in chief, he has stated that keeping in mind the appellant's express desire to stay in English speaking country he accepted the offer of an employment with M/s.A.T.Kearney Australia Pvt. Ltd. and on 17th March, 1999 shifted to Australia with an intention to stay their permanently and thereby he acquired a domicile of his choice by abandoning the domicile of Sweden. He never had an intention to go back to India and, therefore, according to the respondent his domicile of origin never got revived. It appears that even after shifting to Australia in July 1999 he had to leave Sydney and go back to Stockholm in January 2002 since he lost his job their and again in February 2003 moved to Sydney when he got job with Infosys. It is against this backdrop we perused the documents produced by the respondent on record to find out the real intention of the parties. However, before going to the documents we would also like to make reference to the cross examination of the respondent. It would be useful to reproduce paragraph 64 and 65 which reads thus:

> "64. True to say that I was looking out for a job in Sweden and Australia. Not true to say that I looked for a job in U.K., and Belgium. It is not true to say that after July 2001 I have to leave Sydney because I had no job. True to say that I could not stay in Sydney without a job at my will for any length of time. It is correct to state that without an employment Visa is not granted for anyone's in Australia. True to say that since there was no Visa to live in Australia I packed everything and returned to Sweden. All the goods were transferred to Sweden by Shipment including the car. True to say that from January 2002 to December 2002 I lived in Sweden with petitioner and children. It is correct to state that my residence continued to be in Sydney from December 2002 to March 2004.
>
> 65. From March 2004 till today I have been living in Bangalore India. True to say that the rental accommodation in Sydney whose lease period expired in July 2004, I do not have a house in Sydney at present. I disagree that I cannot take the child Natasha to Sydney since I do not have house in Sydney. I disagree that I do not have job in Australia. I am working with Infosys Technology. I am a management consultant. I do not get salary either in Indian rupees or in Australian dollar in India. It is correct to state that the company has kept me as management consultant without payment of salary. I disagree that I do not have work permit to work in Australia".

From the perusal of the aforesaid cross examination, it is clear that he was looking for job either in Sweden or Australia. He has categorically stated that without an employment, visa is not granted to anyone in Australia and since he was not having visa he had to leave Sydney, Australia and went back to

Sweden. He had transferred his all goods by shipment to Sweden including his car and was staying in Sweden from January 2002 to February 2003. He has also stated that at present he does not have house in Sydney. In view of this we perused the documents produced by the respondent who asserts that he acquired domicile of Australia in 1999 itself when he joined A.R.Kaerney Australia Pvt. Ltd. If the respondent had acquired domicile of Australia in 1999 itself no satisfactory explanation is forthcoming as to why he had to leave Australia in January 2001 and as to why his visa was not extended and that being so as to when he exactly acquired domicile of Australia, in 1999 or in February 2003 when he got job with Infosys, Sydney and that what was his domicile between 1999 and until he shifted to Sydney in February 2003. These questions remained unanswered by the respondent. But even if it is assumed that what he claims is correct, we would like to examine the documents to find out whether they are sufficient to gather intention of the parties so as to hold that he acquired domicile of Australia after he abandoned his first domicile of choice, namely, Sweden. He was offered a job by A.T.Kaerney by their letter dated 17.3.1999 which was admittedly transferable job and under the letter of appointment he was liable to be

transferred throughout Australia, Asia Pacific and their global network. Similarly, the another letter dated 6.9.2002 issued by Infosys appointing him as Senior Principal - Consulting Services show that even the job with Infosys was also transferable. The letter of appointment itself makes it clear that company may need to transfer him to company locations or clients sites other than the ones they were initially hired to work at. It was categorically made clear in the said letter that the respondent may be transferred in future based on company's business needs. The said appointment was on probation. With these terms and conditions the respondent had accepted the job with his employers at Sydney. It appears that after he was offered job by Infosys, on 25.1.2003 he entered into residential tenancy agreement for a period of 18 months which also shows that atleast at that stage he did not have an intention to acquire permanent residence in Australia. The other documents such as admission of Natasha in school, payment of tax, gas and electric connection, birth certificate and credit card etc. would only show that he was in fact residing at Australia during that period. These documents, in our opinion, would not take the case of the respondent any further to support his claim that he

had permanently shifted to Australia and/or to show his intention to permanently settle in Australia. The intention cannot be attributed to a person only on the basis of these documents.

15.1. A party to the Matrimonial Petition, who asserts that he has acquired a domicile of his choice, has to prove his intention on the basis of conceivable events and incidents in his life which would be relevant indications of his state of mind. The respondent's state of mind, in our opinion, is reflected in the correspondence produced by him on record. The letter dated 26.1.2004 at page 241 of the compilation in fact shows that he never had an intention to permanently settle in Australia. For whatever reason, he had expressed his intention in the said letter to move back to India. The relevant portion of the letter dated 26.1.2004 read thus:

> . "In order to be closer and in the same time zone for us to continue communicating and understanding better, I am taking the following actions - in line with our tele talk of yesterday:
>
> . I am trying to see if Infosys will keep me on as an employee in India. If this is not a possibility, then I will be resigning from the company. -- I will move back to India anyway. -- I will try to move household items (furnitures, clothes, toys

> etc.) to the extent possible. The rest will dispose off locally. -- As bringing the car into India is not a viable option, I will sell it off here. We stand to risk losing several 10's of thousands of dollars by selling it at this time. If you have any other suggestions I would be glad to hear. Last time you had mentioned some people in India who would pay a good price (including duty fees) to bring in such luxury cars".

15.2 Similarly, the letter dated 27.1.2004 at page 243 of the compilation shows that he was disturbed by the decision of the appellant to never go back to Sydney and join him there. In response to that he had written that the acts of the appellant were seriously jeopardising his job and career and that he may lose the job on account of marital issues. It is clear from this letter that the job was paramount for him for which he wanted to stay in Australia. The letters of appointment coupled with these letters would show that he was prepared to shift from one country to another for the purpose of his employment. These letters, in fact, would show that he did not have an intention to permanently settle only in Australia. As a matter of fact in the letter dated 4.4.2004 written to the appellant he had indicated that he needed a categoric response from her regarding joining him in Australia or whichever country his job will take them. This assertion

clearly shows that he never intended to settle down in a particular country much less Australia. As a matter of fact the entire history of his career shows that he changed several employments and had moved atleast in three countries including India for better opportunities in the employment.

15.3 From the assessment of the material, it is clear that the respondent's short stay in Australia was on the basis of temporary visa and residence. As of today he has no residence in Australia nor does he have job there. However, even if it is assumed that on the date of filing of the petition he had job and residence in Australia that in our opinion is not sufficient to hold that he was domiciled in Australia. It is also not possible to hold that he had an intention to acquire permanent residence in Australia. Mere desire to acquire domicile is not sufficient unless it is coupled with actual residence and intention of a particular kind. The brief residence in Australia in any case would not help the respondent to contend that he intends to reside in Australia permanently and acquire domicile there. As a matter of fact the correspondence between the appellant and the respondent show unsettled state of mind of the respondent.

15.4 Taking the facts of the case as they are, it would not be possible for us to hold that the respondent had ever given up his domicile of origin. However, his pleadings clearly demonstrate that till 1997 his domicile was in India and it prevailed until he acquired citizenship and domicile of Sweden and immediately within less than a year of acquisition of citizenship of Sweden he left that country and abandoned first domicile of his choice. Thereafter, he shifted to Australia. There also he could not continue for long time and he was required to shift out of Australia. He also stayed in India for two years. It is on the basis of these facts, we find force in the submissions made on behalf of the appellant that the parties never gave up their domicile of origin though they changed their place of residence from one country to another and they acquired citizenship of Sweden. It cannot be said the physical fact of shifting to Australia was ever accompanied by the required state of mind. It is fully established that an intention to reside for ever in a country where one has taken up his residence is an essential constituent element for the existence of domicile in that country. The domicile of origin is received by operation of law at birth

and for acquisition of domicile of choice one of the necessary condition is intention to remain there permanently. The domicile of origin is retained and cannot be divested until the acquisition of domicile of choice. By merely leaving once own country, even permanently, one will not, in the eye of law lose his domicile until he acquires a new one. This aspect was discussed in the **Central Bank of India Ltd. Vs. Ram Narain** (supra) where it was pointed out that if a person leaves country of his origin with intention of never returning to it again, neverthless his domicile of origin adheres to him until he actually settles with the requisite intention to some other country. The appraisal of the material on record, in our opinion, does not support the respondent to establish that he ever had an intention of never returning to India and/or settle down in Australia with an intention not to return to India again. The sequence of events and the material clearly demonstrates that he did not acquire domicile of Australia inasmuch as no intention to remain there permanently is reflected either from his conduct or state of mind as is seen from the correspondence with the appellant. The investigation of his actual state of mind does not support his case that he ever abandon the domicile in India. It is against this factual matrix, we are

satisfied that the respondent has miserably failed to establish that he ever abandon Indian domicile and/or intended to acquire domicil of his choice.

16. Even if it is assumed that the respondent had abandoned his domicile of origin and acquired domicile of Sweden alongwith citizenship in 1997, on his own showing the respondent abandoned the domicile of Sweden when he shifted to Sydney, Australia. Therefore, keeping the case made out by the respondent in view and our findings in so far as acquisition of Australian domicile is concerned, it is clear that the domicile of India got revived immediately on his abandoning Swedish domicile. This is in view of the settled principle of Private International Law that if domicile of origin is displaced as a result of acquisition of domicile of choice, the domicile of origin remains in background ever ready to revive and to fasten upon the propositus that moment he abandons his domicile of choice. Looking at the case from any angle and in view of the finding that the appellant never acquired Australian domicile, even when the petition was filed by the appellant the parties were domiciled in India. It is against this backdrop it would not be possible for us to affirm the findings recorded by the Family

Court. The Family Court was wrong in proceeding on the assumption that when the parties acquired citizenship in Sweden they abandoned domicile of origin i.e. India and acquired domicile of Sweden. Even if that is taken as true and correct that would not help the respondent to contend that he acquired domicile of Australia. The Family Court was wrong in holding that domicile can be acquired without owning a house or change in once habits and their stay in Australia for two and half years in the beginning and second time for about a year or so, before the appellant came to India for a break, was sufficient to hold their domicile in Austrilia. The family court further committed an error in holding that the parties acquired domicile of Australia merely on the basis of the document relied upon by the respondent, which as observed earlier, would at the most prove that he had shifted from Sweden to Australia and stayed there for temporary period. These documents would not help the respondent to support his case that he had an intention to settle down in Australia by acquiring permanent residence. Moreover, the family court also erred in relying on the provisions of Indian Succession Act. As a matter of fact the Indian Succession Act does not apply to the matters relating to matrimonial issues, the matters arising

out of provisions of H.M.Act. Section 4 of Indian Succession Act unequivocally states that the part 2 of the Act dealing with the domicile, shall not apply if the deceased was interalia Hindu. The provisions contained in the part 2 of the said Act would not apply to Hindus. In the circumstances, we have no hesitation in setting aside the impugned judgment. Order accordingly. Petition No.A-531 of 2004 stands restored to file. The Family Court shall endeavour to proceed with hearing of the said petition as expeditiously as possible and preferably within a period of one year from today. However, it is open for the Family Court to pass appropriate orders in the applications, if any, seeking custody or maintenance within four months from today. The appeal is, accordingly, allowed with costs.

17. After the Judgment was pronounced in the Court, the learned counsel for the respondent submitted that the Judgment may be stayed for a period of five weeks. Mr.Muchhala, learned counsel for the appellant, strongly objected for grant of stay. He submitted that an issue of custody of minor children is involved in the petition and that till this date no maintenance has been paid by the respondent. Keeping in view the submissions of the

learned counsel for the parties and considering the overall facts and circumstances of the case, we are inclined to grant a stay for a period of five weeks from today. Order accordingly. The interim arrangement, which was existing during pendency of the petition in the Family Court and the present Appeal, shall remain operative till the final disposal of the petition subject to order, if any, is passed in the interim application seeking custody of the minor children and/or maintenance.

. An authenticated copy of this Judgment may be made available to the parties.

(D.B.BHOSALE, J.) **(S.B.MHASE, J.)**

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